

UTAH POWER AND LIGHT CO.

IBLA 78-133

Decided January 12, 1981

Appeal from decision of the Utah State Office, Bureau of Land Management, requiring reimbursement of costs incurred in processing a right-of-way application. FJ16 U 37520.

Affirmed in part, set aside in part, and remanded.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Rights-of-Way: Applications-- Rights-of-Way:
Federal Land Policy and Management Act of 1976

The Federal Land Policy and Management Act of 1976 authorizes the Bureau of Land Management to recover reasonable costs including costs of environmental analyses for applications of rights-of-way across public lands.

2. Accounts: Fees and Commissions--Accounts: Payments--
Rights-of-Way: Applications

Management overhead costs are not a reimbursable cost recoverable from right-of-way applicants under 43 CFR 2802.1-2.

APPEARANCES: Kent H. Murdock, Esq., Ray, Quinney & Nebeker, Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Utah Power and Light Company appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), requiring reimbursement of costs of processing a right-of-way application.

On May 20, 1977, appellant applied for a powerline right-of-way (U-375-20) over Federal land. The right-of-way was required by appellant for construction of the Emery Power Project Units 3 and 4. Appellant submitted a total of \$500 with the application pursuant to 43 CFR 2802.12(a).

On October 28, 1977, BLM informed appellant that it was required to reimburse the United States for the cost of processing right-of-way permit applications, including preparation of reports and statements concerning the impact of the proposal upon the environment. The letter states that it was issued in accordance with the policies expressed in Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. § 483a (1970)), Title III and V of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-71 (1976), and amended subpart 2802.1-2 of Title 43, Code of Federal Regulations, effective June 1, 1975. The letter also states that:

Based on available information, the total estimated cost for processing the rights-of-way associated with your project is \$300,000.

As required by 43 CFR 2802.1-2(a)4, we estimate our initial costs for October 1, 1977 through March 31, 1978 to be \$10,500.00. Therefore, a bill for \$10,000.00 * * * is enclosed to cover costs less \$500.00 paid as filing fees."

Appellant paid the \$10,000 under protest reserving any and all rights which it may have had to contest:

"The applicability, validity, or legal enforceability of Title V of the Independent Offices Appropriation Act of 1952 (31 USCA 483a), Sections 201 and 204 of the Public Land Administration Act (43 USCA 1371 and 1374), the provisions of 43 CFR 2803.1-2 * * * or Title III and V of the Federal Land Policy and Management Act of 1976 and any regulations promulgated pursuant thereto."

Appellant filed a notice of appeal as provided for in the BLM letter of October 28, 1977.

By letter dated March 21, 1978, BLM informed appellant that as of February 28, 1978, \$27,197.89 had been expended for the Emery Project Units 3 and 4. Appellant was billed \$122,000 for the estimated costs for the period March 1, 1978, through June 30, 1978, which included the \$17,197.89 overexpenditure for the first half of fiscal year 1978. The payment was requested from Utah Power and Light Company in accordance with Organic Act Directive No. 77-65, dated August 12, 1977, and by two supplemental appropriations acts dated May 4, 1977 (P.L. 95-75). Appellant paid the \$122,000 and filed a second notice of appeal.

On appeal, appellant objects to all the required payments except the \$500 paid as a filing fee. In its statement of reasons appellant questions BLM's authority under the applicable laws and regulations to require appellant to reimburse the United States for the costs of processing the right-of-way application. Appellant specifically argues that:

- (1) The cost recovery demanded of appellant is not authorized by statute or regulation.
- (2) The cost recovery demanded of appellant exceeds the reasonable costs to the Government of processing appellant's right-of-way application.
- (3) The applicable law requires the exclusion from cost recovery of that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant.
- (4) The preparation of environmental studies and impact statements benefits the general public interest and not the applicant, hence the cost of preparation is not recoverable.
- (5) The inclusion of the costs of environmental studies and impact statement in the cost recovery demanded of appellant is unlawful.
- (6) The cost recovery demanded is excessive and therefore not reasonable.

[1] Regulation 43 CFR Subpart 2802, amended in 1975 to require right-of-way applicants to bear the costs associated with processing of a right-of-way application, was promulgated under the authority of the Independent Offices Appropriations Act of 1952, 31 U.S.C. § 483a (1976). Section 304(a) of FLPMA, 43 U.S.C. § 1734(a) (1976), specifically authorizes the Secretary of the Interior to establish "reasonable filing and service fees and reasonable charges, and commissions with respect to applications." Section 304(b) provides:

The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into

consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

The cost recovery provisions of sections 304 and 504(g) of FLPMA were implemented by Secretarial Order No. 3011, 43 FR 55280 (Oct. 14, 1977). The Secretarial order stated that the implementation would apply to all applications for rights-of-way over public lands which were pending on October 21, 1976, or which were filed subsequently. The regulations at 43 CFR 2802.1-2 were specifically made applicable to applications for rights-of-way. ^{1/}

Appellant's assertions that the regulations are either too vague and nebulous or invalid, that the recovery of costs relating to environmental studies constitutes an unreasonable tax, and that the portion of the costs incurred for environmental analyses benefits the general public rather than appellant and is therefore invalid, have been addressed and answered by the Court of Appeals for the Tenth Circuit in Alumet v. Andrus, 607 F.2d 911 (1979). In Alumet the court stated:

Clearly, FLPMA is an express legislative mandate that all reasonable costs incurred by the Secretary in processing an application for rights-of-way on public lands shall be chargeable against the applicant for such rights-of-way, and further, that "reasonable costs" include, among other things, the costs of environmental impact statements. We shall assume that Congress was aware of its limitations in delegating the authority to "tax."

607 F.2d at 916.

The Alumet court did not address the issue of whether the full costs of an environmental impact statement (EIS) can be recovered from a right-of-way applicant. The court overturned the rule of the district court below that section 304 of FLPMA did not authorize the Secretary of the Interior to seek reimbursement from an applicant for any part

^{1/} Regulation 43 CFR Part 2800 was amended effective July 31, 1980. 45 FR 44518 (July 1, 1980). The reimbursement of costs section of the amended regulation is virtually unchanged from the regulation promulgated in 1975. Application of the amended version of the regulation to the facts presented by this appeal would not benefit appellant. See Henry Offe, 64 I.D. 52, 55-56 (1957). It should be noted that Secretarial Order No. 3011 expired, by its own terms, when regulations were promulgated.

of the costs of preparing an EIS. In Colorado-Ute Electric Association, Inc., 46 IBLA 35 (1980), 2/ this Board following Miss. Power & Light v. U.S. Nuclear Regulatory Comm., 601 F.2d 223 (5th Cir. 1979), cert. denied, 100 S.Ct. 1066 (1980), held that BLM may recover the full costs of preparing environmental studies associated with right-of-way applications. Although neither Colorado-Ute nor Miss. Power & Light arose under FLPMA, the rationale of both cases is equally applicable in this instance. The environmental studies and reviews are an integral part of the right-of-way application and as such directly benefit the applicant in this instance.

Appellant is correct in its assertion that BLM may not calculate the total cost (direct and indirect) and then contrive a formula for reimbursement of that amount if some portion of that cost inures primarily to the benefit of the general public, citing National Cable Television Assn., Inc. v. United States, 415 U.S. 336 (1974), and FPC v. New England Power Co., 415 U.S. 345 (1974). However, with the possible exception of "management overhead" costs, discussed infra, it does not appear that BLM has done so in this instance.

Congress implemented the revolving account established in section 304(b) of FLPMA through the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1978, P.L. 95-74, 91 Stat. 285 (1977). The moneys collected under sections 304(a), 304(b), 305(a), and 504(g) of FLPMA are the only funds appropriated by Congress for processing right-of-way applications. This process of appropriation has been continued through fiscal year 1980 and is the only source of funds available for preparation of environmental impact statements associated with rights-of-way over Federal lands.

Appellant argues that because proposed plant units Emery 3 and 4 are on private land, no EIS is required for them, and even if required, the cost of preparation is not recoverable by BLM. We disagree. If the allowance of the use of Federal land is necessary or important to the implementation of the proposed use of the private land, the environmental effect of the entire project must be evaluated. It has been held that the only involvement necessary by the Federal government to constitute a major Federal action requiring an environmental impact statement is the approval or licensing of a project. See, e.g., Davis v. Morton, 469 F.2d 593 (10th Cir. 1972). We find nothing in the National Environmental Policy Act which exempts private lands from its ambit where there is a significant Federal involvement in the proposed undertaking, and appellant has cited no authorities in support of its contention.

2/ Appeal pending Civ. No. 800-500 (D. Colo. Apr. 16, 1980).

[2] In addition to appellant's contentions resolved in the discussion above, appellant also asserts that:

[T]he BLM does not properly segregate its employees' time spent on one project from that spent on others, does not keep proper records, does not properly identify the elements of indirect costs charged, does not properly calculate the cost basis of the charges, does not properly explain the charges, and does not exclude costs incurred to serve the public interest. Costs not properly allocable to appellant are charged to it.

(Statement of Reasons, p. 5).

The BLM letter of October 28, 1977, lists the following costs as reimbursable:

1. Salary, per diem, and travel of all personnel involved in actual processing of applications, such as record keeping, field examination, adjudication, Environmental Analysis Reports/Environmental Impact Statements, etc.
2. Costs of contracts, fees of consultants, costs of public meetings and hearings, and costs of other special arrangements made to assist in the processing of the applications.
3. Purchase and hire of special materials and equipment, including photos, maps, data, etc.
4. Extra incremental costs incurred for accelerating planned cadastral surveys, Management Framework Plans, and field examination for the benefit of the applicant.

The above costs are the type of costs contemplated by FLPMA and the implementing regulations. BLM can charge only that amount necessary to evaluate a right-of-way application pursuant to FLPMA. There is no indication that BLM has utilized money from the revolving fund for other than proper purposes. However, appellant's contention that BLM does not properly identify the elements of indirect costs charged, has merit.

While recovery of all costs associated with right-of-way applications including the costs of preparing environmental studies is mandated by FLPMA, the same does not hold true for management overhead which is not recoverable by statute. The record shows that of appellant's estimated obligation of \$122,000 for the period March 1, 1978, through June 30, 1978, \$14,968.48 or 15.4 percent (see Appendix) of appellant's estimated direct charges of \$97,197.89 were billed as indirect costs.

The aforementioned charge was imposed by Organic Act Directive No. 77-65 dated August 12, 1977. However, BLM's cost breakdown does not permit us to determine whether any of the charges billed as indirect costs are charges for "management overhead" which is not permissible. Accordingly, we remand the case to BLM for a determination whether any of those costs billed as indirect costs were charges for management overhead.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, set aside in part, and remanded for action consistent with this opinion.

Edward W. Stuebing

Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Bruce R. Harris
Acting Administrative Judge

APPENDIX

UTAH POWER AND LIGHT COMPANY

Emery Project, Units 3 & 4

Project No. F016

Breakdown of Costs

<u>Action</u>	<u>Cost</u>
Received from Utah Power and Light Co. October 1977-March 1978	\$10,000.00
Expenditures through February 1978	<u>27,197.89</u>
Overexpenditures From March 1-June 30, 1978	\$17,197.89 Estimated Obligations <u>80,000.00</u>
Direct Costs	\$97,197.89
Indirect Costs	\$14,968.48
Leave Costs	<u>\$9,719.79</u>
Total Amount Due From Utah Power & Light Co.	\$121,886.16
Rounded	\$122,000.00

